



September 18, 2002

Mr. J. Robert Giddings  
The University of Texas System  
Office of the General Counsel  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2002-5265

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168083.

The University of Texas Medical Branch ("UTMB") received seven requests for information relating to its willd body program (the "program"). You indicate that UTMB has released some of the requested information. You also indicate that UTMB does not have information responsive to some portions of the requests. We note that the Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ diss'd); Open Records Decision No. 452 at 3 (1986). You claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.116 of the Government Code. We have also received arguments from the Federal Bureau of Investigation (the "FBI") and one of the requestors. See Gov't Code § 552.304. We have considered all of the submitted arguments and reviewed the submitted information.

We begin by noting that you have not fully complied with section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Although you have provided this office with copies and representative samples of most of the requested information, you have not provided this office with copies or representative

samples of information responsive to Michael Josephson's request for names of employees responsible for overseeing contractors responsible for transporting bodies to and from UTMB. In addition, you submitted information responsive to portions of Kevin Moran's requests and Michael Josephson's requests beyond the fifteen-business-day deadline.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to timely submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Generally, a compelling reason sufficient to overcome the section 552.302 presumption of openness exists only where the information is confidential by law or its release implicates third party interests. *See, e.g.*, Open Records Decision No. 150 (1977). Sections 552.103 and 552.116 of the Government Code are discretionary exceptions and do not provide compelling reasons for overcoming the presumption that the information is subject to public disclosure. *See* Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under the Public Information Act can be waived). Nevertheless, section 552.101 can provide a compelling reason for overcoming the presumption of openness. *See* Open Records Decision No. 150 (1977) (confidentiality provisions and exceptions designed to protect the interests of third parties can provide compelling reasons for overcoming presumption of openness). Furthermore, the need of another governmental body to withhold information under section 552.108 can provide a compelling reason under section 552.302. *See* Open Records Decision Nos. 630 at 3 (1994), 586 at 3 (1991). You assert that the FBI has a law enforcement interest in the information at issue. In turn, the FBI has submitted a letter to this office requesting that the requested information be withheld based on its law enforcement interests. Therefore, your argument under section 552.101 as well as the FBI's claim can be applied to all of the responsive information, including the information that you did not timely provide to this office. *See* ORD 586 at 3. Your arguments under section 552.103 and 552.116 of the Government Code, on the other hand, can only be applied to the information that you provided to this office within the fifteen-business-day deadline.

Next, we note that some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;
- (2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;
- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body . . . .

Gov't Code § 552.022(a)(2), (3). Therefore, UTMB may withhold the information from the submitted serology reports only if the information is excepted from disclosure under section 552.108 of the Government Code or if the information is made confidential by other law. Similarly, UTMB may withhold the submitted vouchers, which we have marked, as well as the names of employees responsible for overseeing contractors responsible for transporting bodies to and from UTMB if the information is confidential under other law. Sections 552.103, 552.108, and 552.116 of the Government Code are discretionary exceptions and are not other law under which information is considered confidential.<sup>1</sup> On the other hand, section 552.101 of the Government Code excepts from disclosure information made confidential by law. Therefore, while the information subject to section 552.022(a)(2) and (3) may not be withheld under sections 552.103, 552.108, and 552.116 of the Government Code, the information can be withheld if it is excepted from disclosure under section 552.101 of the Government Code. Thus, we will address whether the information subject to section 552.022(a)(2) and (3) must be withheld under section 552.101 of the Government Code. On the other hand, we will address whether the information subject to section 552.022(a)(1) is excepted under either section 552.101 or section 552.108.

First, we address your argument under section 552.101 of the Government Code with respect to the information that is subject to section 552.022(a)(2) and (3). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert.*

---

<sup>1</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 592 at 8 (1991) (governmental body may waive section 552.104), 586 (1991) (governmental body may waive section 552.108), 549 at 6 (1990). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

*denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. You contend that the identities of deceased individuals who donated their bodies to the program as well as the identities of their family members should be protected under common-law privacy. Specifically, you contend that the release of the information identifying the family members of participants in the program “would serve to embarrass these persons regarding the private arrangements made by a family member to participate in the program . . .” The only individuals identified in the information subject to section 552.022(a)(2) and (3) are employees of UTMB and deceased individuals who donated their bodies to the program. The information does not refer to or contain information about the family members of the individuals who participated in the program. As such, the privacy interests of family members do not protect the information from disclosure under section 552.101. Furthermore, the deceased individual’s privacy interests extinguished upon their death. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.–Texarkana 1979, writ ref’d n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); *Cordell v. Detective Publications, Inc.*, 419 F.2d 989, 990 (6<sup>th</sup> Cir. 1969) (under Tennessee common law, action for public disclosure of private matters lapses with the death of the person whose privacy is invaded); *Swickard v. Wayne County Med. Exam’r*, 475 N.W.2d 304, 309 (Mich. 1991) (“action for the invasion of privacy cannot be maintained after the death of the person whose privacy is invaded”) (quoting Restatement of Torts 2d); Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”). Therefore, we find that none of the information subject to section 552.022(a)(2) and (3) is confidential under common-law privacy. Consequently, UTMB must release the marked vouchers as well as the names of employees responsible for overseeing contractors responsible for transporting bodies to and from UTMB.

With respect to the remainder of the submitted information, we address the FBI’s arguments in conjunction with section 552.108 of the Government Code. Section 552.108, the “law enforcement exception,” excepts from required public disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that raises section 552.108 must reasonably explain, if the responsive information does not do so on its face, how and why section 552.108 is applicable. *See* Gov’t Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). The FBI indicates that the requested information relates to an ongoing

criminal investigation by the FBI and that disclosure of the information would therefore interfere with its investigative efforts. Based on these representations and our review of the information in question, we find that the release of the information would interfere with the investigation efforts of the FBI. See Gov't Code § 552.108(a)(1); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); ORD 586 at 3 (addressing statutory predecessor to section 552.108).

Consequently, UTMB may withhold the submitted information, with the exception of the information subject to section 552.022(a)(2) and (3), under section 552.108(a)(1) of the Government Code. UTMB must release the information subject to section 552.022(a)(2) and (3).<sup>2</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

---

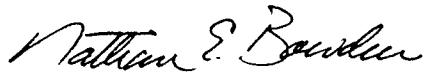
<sup>2</sup>Based on this finding, we need not reach the remainder of your arguments.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 168083

Enc: Submitted documents

c: Mr. Kevin Moran  
Houston Chronicle  
6710 Golf Crest Drive  
Galveston, Texas 77551  
(w/o enclosures)

Mr. David George  
Edwards & George  
5847 San Felipe, Suite 2375  
Houston, Texas 77057  
(w/o enclosures)

Mr. Michael A. Josephson  
Edwards & George  
5847 San Felipe, Suite 2375  
Houston, Texas 77057  
(w/o enclosures)

Ms. Mindy Blake  
KOLD-TV  
7831 North Business Park Drive  
Tucson, Arizona 85743  
(w/o enclosures)

Mr. Carter Thompson  
The Galveston County Daily News  
8522 Teichman  
Galveston, Texas 77554  
(w/o enclosures)